UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, WI

TYSON FOODS, INC.[1]

Employer

and **Case 30-UD-165**

AARON M. KLOSKE

Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 538, AFFILIATED WITH UFCW, INTERNATIONAL UNION, AFL-CIO[2]

Union

DECISION AND DIRECTION OF ELECTION[3]

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[1]The name of the Employer appears as amended at hearing.
[2]The name of the Union appears as amended at hearing.
[3]Upon a petition duly filed under Section 9(e) of the National Labor Relations Act (Act), as amended, a hearing was held before a hearing officer of the National Labor Relations Board, (Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, including timely post-hearing briefs filed by all parties, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction. The Employer is engaged in the business of meat processing. During the year preceding the filing of the petition, a representative period, the Employer purchased and received at its Jefferson, Wisconsin facility goods valued in excess of $50,000.00 directly from points located outside the State of Wisconsin.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   All production, maintenance, lab, warehouse, crew leaders, packinghouse, janitors, boiler room and clean-up employees; excluding supervisors, guards, professional, managerial and office clerical workers.

5. Petitioner seeks an election to rescind the Union's authority to require, under its collective-bargaining agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their employment.

Background

The Employer produces pepperoni and other processed meats from its Jefferson, Wisconsin facility. The Union has represented the bargaining unit for at least ten years, which is reflected by a series of consecutive bargaining agreements.[4]

Negotiations for the most recent collective bargaining agreement (CBA) began in May 2002 and extended over 30 bargaining sessions. A strike began on February 28, 2003 and lasted until January 30, 2004 when the union members ratified the successor CBA and the Strike Settlement Agreement (SSA) went into effect.[5] During the strike the Employer hired approximately 380-390 replacement workers.[6]

Issues

The primary issue in this case is whether the replacement workers are permanent replacements. I must also resolve two related issues - whether unrecalled strikers, currently on a preferential hiring list, are eligible to vote and whether the strikers who have not submitted a Job Preference Recall Form (recall form) to the Employer are eligible to vote.[7]

Summary Conclusions

Based on the facts and the analysis articulated below, I find that:

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[4] The Union-Security provision, set forth in the current collective-bargaining agreement at Section 6, states:

> Union Shop: The Company agrees to require as a condition of employment that all its present employees subject to the provisions of this Agreement shall be required to pay uniform periodic union dues and all new employees covered by this Agreement hired on or after the date of this Agreement is signed, shall on the thirty first (31st) day following the beginning of such employment pay uniform periodic union dues.

[5] Approximately 400-450 workers went on strike.

[6] I take administrative notice that the Union filed Unfair Labor Practice (ULP) Charge 30-CA-16366 during the strike, alleging bad faith bargaining and a refusal to provide information. The Regional Director dismissed that Charge. The dismissal was upheld on appeal to the General Counsel. There is no other testimony suggesting that there is any basis for the strike to be considered a ULP strike. I, therefore, find that the strike at issue was an economic strike.

[7] The parties stipulated that the evidence elicited at the hearing would be used in connection with the current outstanding unfair labor practices filed by the Union (Case 30-CA-16766) regarding the employment status of replacements. I, however, will make findings only regarding the voter eligibility of the replacement workers and the former strikers.

1. The replacement workers are permanent and are, therefore, eligible to vote. I find that the Employer established that the replacements were hired as permanent replacement workers and that the totality of the Employer's actions demonstrate that message was relayed to the replacements.

Based on my finding that the replacement workers are permanent and, therefore, eligible to vote, it is unnecessary to determine whether the Union waived the former strikers' right to immediate reinstatement. However, should the Board determine that the replacements are temporary, and based on the facts and analysis articulated below, I find that the Union did not clearly and unmistakably waive the former strikers' right to reinstatement. Therefore, if the Board finds the replacements are temporary, the former strikers are eligible to vote.

2. Those former strikers who have not been reinstated as of the voter eligibility date of the election are ineligible to vote, based on the evidence that the economic strike began over 12 months ago.

3. It is unnecessary to decide whether strikers who have not submitted a Job Preference Recall Form have abandoned their jobs. To the extent there are questions regarding this issue, this is not the proceeding in which to make those determinations. However, I note, in accordance with my above finding, that all unrecalled strikers, including employees who did not submit recall forms, who have not been reinstated by the voter eligibility date are ineligible to vote.

Discussion

1. Voter Eligibility of Replacement Workers Hired since April 7, 2003,

A. Voter Eligibility of Replacement Workers

The Employer and the Petitioner both assert the replacements who were hired during the strike and are currently working at the Jefferson facility are permanent replacement employees and eligible to vote.

Conversely, the Union asserts that the replacements are temporary replacements who should have been terminated by the Employer when the strike ended and they are therefore not eligible to vote.

1. Legal Standard

Individuals hired as replacements for strikers are presumed to be temporary employees, and the Board has placed the burden on the employer to prove that strike replacements are permanent employees. *O.E. Butterfield, Inc.*, 319 NLRB 1004, 1006 (1995). An employer will meet this burden by demonstrating that it had a mutual understanding with the replacements that they are permanent. Ibid. No single piece of evidence should be relied on in making that determination, rather, the evidence as a whole must "support, rather than undermine, the message of permanent employment, and that message be so understood by the replacements." *Target Rock Corp.*, 324 NLRB 373, 375 (1995), *enfd. 172 F.3d 921 (D.C. Cir. 1998)*.

2. Factual Findings

After the strike began on February 28, 2003, the Employer initially used temporary replacement workers, staffed through QPS Staffing Services, Inc. (QPS), to continue production at the Jefferson facility. Thereafter, by letter to the Union dated April 3, 2003, the Employer's Director of Labor Relations, Timothy McCoy, notified the Union

that beginning April 7, 2003, it would begin using permanent replacement workers and converting existing temporary replacements to permanent status.[8]

The Employer, beginning on April 5, 2003 ran advertisements in 10 Jefferson area newspapers for several weeks stating that it was hiring "permanent replacement workers." Pursuant to those advertisements, as well as word of mouth, employees applied for work with the Employer from April 2003 until January 2004. Applicants who were hired went through an application and interview process, orientation process and had conversations and meetings in which their employment status was discussed.

a. The Application and Interview Process

Tyson Foods Regional Recruiter Carlos Diaz was involved in hiring of over 90% of the replacement workers.[9] Diaz testified that he used the same hiring process and hiring packet, including application, that he has used when hiring employees at other Employer facilities, including its unionized plants in Logansport, Indiana and Shelbyville, Tennessee.[10] The exception to this was that employees at Jefferson were also

[8] During negotiations for a successor CBA, in December 2003 and January 2004, the Employer repeatedly reaffirmed its position that the replacements were permanent. Union President and Business Manager Rice confirms that the Employer consistently took this position.

[9] Diaz testified that employees who had been temporary employees were put through the same hiring procedure as all the other individuals.

[10] The concluding paragraph of the application includes the following language:

> I understand that this application and any other company documents are not contracts of employment, and that any individual who is hired may voluntarily leave upon proper notice, and may be terminated by the Company at any time and for any reason. I understand that any oral or written statement to the contrary are hereby expressly disavowed and should not be relied upon by any prospective or existing employee or contractor. I also understand that I will be subject to a probationary period.
>
> I understand that Tyson does not intend to enter into any contract of employment unless expressly stated in writing signed by the highest ranking Human Resources Officer.

The parties stipulated that all replacements hired by the Employer during the strike completed the employment application. Moreover, the evidence demonstrated there was no written statement from the highest ranking Human Resources Officer, Senior Vice-President of Human Resources Ken Kimbro.

provided with a Permanent Replacement Acknowledgment form (PR form).[11] The form stated:

> I understand Tyson Foods, at its Jefferson, Wisconsin facility, has offered me a permanent replacement position subject to the terms and conditions as set forth in relevant Tyson policies or as adapted from an expired collective bargaining agreement for this facility. It is understood this offer of permanent employment is valid unless the National Labor Relations Board or the settlement with the union requires termination of employment.
>
> I accept this offer of permanent employment.

Diaz testified that this form was initially shown to, but not signed by, applicants when they filled out an application and when they were interviewed for a position, usually the following day. If Diaz thought the applicant was a suitable candidate, the applicant was offered the job contingent on filling out an I-9 form and passing a drug test and physical. After passing the drug test and the physical, within two or three days, the person would return to Watertown (where the application and interview process took place) to complete the paperwork to be hired. At that point Diaz required employees to read and sign the PR form.[12]

Further, during the application and interview process, Diaz asked the applicants if they had questions about the PR form. Employees asked questions about their status and about rumors that the Union would kick them out if they won (made an unconditional offer to return to work). In response, Diaz testified that he went over the PR form with them, read the PR form to them, told them that they were being hired as permanent

[11] Jefferson General Manager Thomas Devlin Traver testified that after the QPS temporary workers completed a 12-week probationary period, they were allowed to fill out applications to become a permanent replacement worker. Temporary employees signed the PR form only at the time they were being accepted as a permanent employee of the Employer.

[12] The parties stipulated that every employee hired by the Employer from March 1, 2003 to January 30, 2004 signed copies of the PR form.

replacements and told them that everyone they hire was going to be kept even if the Union strike was resolved.

In addition to Diaz's testimony, replacement workers Brueckner, Knox, and Seamars testified about the hiring and interview process. Brueckner testified that he understood from the application that he could be terminated by the Company at any time and for any reason. He also understood that he could be terminated if the National Labor Relations Board was to issue a decision requiring that. However, regardless of the other forms, he ultimately understood his job to be permanent "because according to the bottom part of this sheet it says, 'I accept this offer as permanent employee.'"

Knox testified that he filled out the PR form but that he was not specifically told about his status at that time.

Seamars testified that she filled out the PR form when she filled out her paperwork during the application and interview process. She testified that she understood when she signed the permanent replacement acknowledgment form that she could be terminated if either the National Labor Relations Board issued a decision requiring that or the company entered into an agreement with the Union requiring that. However, she also testified that Diaz told her that, in Tyson's history, they had never gotten rid of permanent replacement workers.

b. The Orientation Process

Within about a week of being hired, but before they began work, the replacement workers attended an orientation session at the Jefferson facility. The orientation sessions were run by Plant Employment Manager Sandy Hoffman, Human Resources Manager at the Jefferson Facility Ken Walters, and Benefits Counselor Barbara Walters. In her undisputed testimony, Hoffman stated that she and Ken Walters initially met with the

replacement workers and talked to them briefly about their experiences coming through the strike line. Ken Walters and Hoffman answered questions the replacement workers had about their status. When employees asked if they were permanent, she and Walters responded that yes, the employees were permanent replacement workers. When employees asked if they would still have jobs when the strike was over, Walters and Hoffman responded that it was their intention that they would all remain working. After they answered the employees' questions, Ken Walters left and Hoffman continued her portion of the orientation.

Hoffman testified that her portion of the orientation, other than being to a large group rather than one-on-one, was no different than the orientation process that newly hired employees went through before the strike occurred. This included both previous temporary employees and off-the-street applicants.

During the orientation Hoffman had employees sign a prepared document acknowledging their pay, seniority, probationary period, benefits eligibility, labor dispute language, necessity to sign a new PR form if their position changed, and harassment policies. At the top of this document it stated,

> I understand that I am being hired as a permanent replacement worker subject to the terms and conditions set forth in relevant Tyson policies or as adapted from an expired collective bargaining agreement for this facility.

After Hoffman finished her portion of the orientation, Barbara Walters began her portion of the orientation process.

Barbara Walters introduced the replacement workers to the benefits for which they would be eligible and the Employer's harassment, sexual harassment and discrimination policies. Additionally, she showed them an ethics video. In her undisputed

testimony, Walters testified that during her portion of the orientation the replacement workers typically asked what would happen when the Union came back. She responded, "It is my understanding that you are a permanent replacement worker and you have ownership to your job."

Replacement worker Knox testified that during orientation, Ken Walters, Hoffman and Barbara Walters stated that they were replacement workers and as long as they did their jobs to the best of their knowledge, they would stay, that they only way they could be terminated was if the Employer thought the replacement workers were not doing their jobs. Additionally, replacement worker Seamars testified she did not remember the specific words used during orientation but, when the issue of their employment status was raised, she heard that they were permanent replacement workers and there was never any question, as far as they knew, of "getting rid of" them.

c. Conversations and Meetings in Which the Replacement Worker Status was Discussed

After their orientation, replacement workers began working at the Jefferson facility. Several managers and supervisors had individual conversations and meetings with the replacement workers that included a discussion of their employment status.

Hoffman testified that initially, from about April to August 2003, replacement workers came to her every day with questions about their status because of what they heard crossing the strike line. They asked her if they were going to remain working. In response she said, "yes, [you] have been hired as a permanent replacement employee."

Additionally, Manager of Processing Department Scott Feldschneider, Production Supervisor Shelley Krahenbuhul and Production Supervisor Rob Muersch testified without dispute that replacement workers asked them about the status of their jobs. When

questioned, Feldschneider told them, “that they were permanent replacements, they were hired on, that they were the crew to staff the dry rooms or smokehouses and they owned those jobs.”[13] Krahenbuhl similarly told replacement workers when they were first hired that they were hired as permanent replacement workers and that was their status. Muersch told them they were hired as permanent replacement workers and the Company's position is they are permanent to the Jefferson facility. He encouraged them to do the best they could on their jobs and to keep their attendance up and follow the guidelines on good manufacturing practices and safety procedures and reassured them that they had a permanent position at the Jefferson facility.

While Brueckner testified that he did not have further questions about his status, he heard other people asking managers and supervisors about their status. He testified that they were told that, “our jobs were our jobs and the only way we could lose our jobs was if we basically screwed up and got fired.”

In addition to the impromptu conversations, managers and supervisors had meetings with the replacement workers in which they discussed their employment status. Barbara Walters had additional mandatory meetings with the replacement workers in the month preceding their eligibility for benefits in order to further explain their benefits. During those meetings the replacement workers repeated questions about their status. During the time that there were outstanding unfair labor practice charges against the Employer, Walters told replacement workers “the Labor Board was reviewing a lawsuit that stated that the company had a charge of unfair labor practices that enabled the union to possibly make the company terminate all the replacement workers.” After the charges

[13] The parties stipulated that the production supervisors or department supervisors have either the authority to hire or fire or discipline and have exercised that authority or have effectively so recommended within the past year. I find they are Section 2(11) supervisors.

were dismissed she explained to the replacement workers that the Board found that the Company did not commit an unfair labor practice and, therefore, the Company would not be forced to terminate the permanent replacement workers. She stated that they were permanent replacement workers, that they had ownership of their job.

During mandatory monthly production meetings Muersch testified, in response to comments made to replacement workers on the strike line, that he and Management co-worker James Miller "reassure[d] them that the company has hired them as permanent replacement workers and that it is their job performance that they will be judged on and we would encourage them to make the most of that and that we looked forward to seeing them in our facility on a long term basis." During Krahenbuhl's monthly meetings with the replacement workers, she reaffirmed what they were told when they were first hired, that they were hired as permanent replacement workers and that was their status.

Additionally, around July 2003, after a second ULP charge was dismissed, Jefferson General Manager Thomas Devlin Traver, Senior Production Manager Mike Wendt and Ken Walters held line meetings with all the replacement workers and told them they were permanent replacements for the Employer. Traver attended all 10 to 15 meetings and at the meetings he said that was one hurdle that was reached and the replacement workers were permanent workers for Tyson Foods.

Traver held additional meetings around December 2003, when it was general knowledge that the Company and the Union were returning to the bargaining table. According to Traver's uncontradicted testimony, the strikers repeatedly told replacement workers that the Union was going to settle and the replacement workers were going to be out of their jobs. Because of the comments Travers personally held meetings with all the replacement workers and told them that their jobs were secure and the Company had no intention of doing anything different. He said

that regardless of what they heard crossing the strike line the Company had no intention of negotiating anything that would jeopardize their status as permanent replacement workers.

Feldschneider held an impromptu meeting before Traver's December 2003 meetings in which he told the replacement workers he supervised that they were permanent replacements, that they owned the jobs.

3. Legal Conclusions

I find the Employer has met its burden of proving that the replacement workers are permanent. In *O.E. Butterfield*, 319 NLRB 1004, 1006 (1995), the Board explained that it is the burden of the Employer, "which has control over employees' status, to communicate clearly with employees as to whether they have been hired on a permanent or temporary basis." Further, the Employer will meet its burden by demonstrating that it had a mutual understanding with the replacements that they are permanent. Ibid. In *Butterfield*, the Board found replacement employee Gaspervich to be a permanent replacement even though he was originally told only that he was full-time. Id at 1005 and 1007. The Board concluded it was sufficient that sometime after Gaspervich was hired the Company President told him that he was permanent, even though he originally was told that he was full-time. Id at 1007.[14]

In the present case there is substantial undisputed evidence that the Employer repeatedly told replacements they were permanent replacements. This began with the Employer's placement

[14] The Employer and the Union both cite *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524 (2002), for the burden the Employer must meet to establish that the replacements are permanent. The burden described in *Consolidated Delivery* is consistent with *Butterfield*, supra. It requires that there be an "adequate showing that there was a mutual understanding between the employer and the replacements that the nature of their employment was permanent." Id at 526, citing *Target Rock Corp.*, 324 NLRB 373 (1997), enf'd. 172 F.3d 921 (D.C. Cir. 1998); and *Harvey Mfg,*, 309 NLRB 465, 468 (1992). Further, *Consolidated Delivery* requires the Employer to demonstrate "the replacements were hired in a manner that would show that the men and women who replaced strikers were regarded by themselves and the employer as having received their jobs on a permanent basis." *Consolidated Delivery*, supra at 526, citing *Target Rock*, 327 NLRB at 373 (quoting *Georgia High-way Express*, 165 NLRB 514, 516 (1967), affd. Sub nom. *Truck Driers & Helpers Local 728 v. NLRB*, 403 F.2d 921 (D.C. Cir. 1968), cert. Denied 393 U.S. 935 (1968)).

of advertisements in the papers seeking "permanent replacement workers" and continued through the hiring process. Reference to permanence was repeated by the Employer during periods of employee uncertainty triggered by ULP charges and renewed bargaining. Throughout their application process and employment, the replacement workers were repeatedly told they were permanent replacements, that they had ownership of their jobs and that they would be kept even if the strike was resolved.

The Union cites *Harvey Mfg.*, 309 NLRB 465, 468 (1992) and *Gibson Greetings, Inc.*, 310 NLRB 1286, 1292, n. 19 (1993), enf'd. as modified 53 F.3d 385 (D.C. Cir. 1995) to support its argument that the replacements are not permanent. Both cases are factually inapposite. In *Harvey,* the 265 replacement employees all received and signed a document entitled "Temporary Agreement," in which the first sentence began, "I will be working as a temporary…" Further, they all received referral slips identifying their employment as "Temporary Positions," supra at 468. In *Gibson Greetings,* the Board discounted a letter sent to replacements several weeks after they were hired because it was not relevant to the replacements' state of mind when they entered into the employment relationship. Additionally, the Board relied on the testimony of the only replacement worker to testify, who said she was told they did not know how long they would be there, "till this was all over," supra at 1290. Finally, the evidence in *Gibson* demonstrated that employees were told only that they were being hired as "full time" associates. Ibid. Both cases cited by the Union involve the Employer sending mixed signals to the replacement workers. This is unlike the consistent message of permanence relayed to replacements at Tyson.

The Union also contends that *Target Rock Corp.*, 324 NLRB 373 (1997) and *Belknap v. Hale*, 463 U.S. 491 (1983) preclude a finding that the replacements were permanent because the

replacements signed Tyson's application which includes an "employment at will" statement.[15] *Target Rock* does not mandate such a finding. The Board in that case relied on several factors that suggested the Employer did not intend to hire the replacements permanently. Specifically, the Employer advertised that it was in the midst of negotiations with striking union members… and the positions it was seeking "*could* lead to permanent full-time employment." Id at 373 (emphasis added). When they were hired the replacement workers were told they were "permanent at-will employees unless the National Labor Relations Board considers you otherwise, or a settlement with the Union alters your status temporary status." Id at 374. Additionally, the Board considered evidence that the employer's negotiators told the union that the replacements were temporary and that they would be discharged if the union made an unconditional offer to return to work. Ibid. Finally, the employer's director of human resources referred to the replacements as temporary in an affidavit taken by the General Counsel. Ibid. The Board concluded that there was little to draw on to establish that the employees' status was permanent. Ibid.

In *Target Rock*, the Board emphasized that the evidence, as a whole, must "support, rather than undermine, the message of permanent employment, and that message be so understood by the replacements." Id at 375. While the Employer in the present case required employees to sign an employment application containing an "at will" statement, this statement, standing alone, does not undermine the Employer's consistent message to the replacement workers that they were permanent. The Employer's actions, as a whole, support the message of

[15] The Union further relies on footnote 9 of *Target Rock*, supporting the proposition that at-will statements are always inconsistent with permanent status. In *Target Rock*, the Board stated that the Court, in *Belknap*, in distinguishing *Covington Furniture Mfg. Corp.*, 212 NLRB 214 (1974), enf'd. 514 F.2d 995 (6th Cir. 1975). "made it clear that the kinds of conditional offers it believed could be defended as offers of permanent employment did not include offers advising replacements that they 'could be fired at the will of the employer for any reason.'" However, it is important to note that in *Covington*, the Employer made no promise of permanence to the replacements and the implication from the method of hiring was that they were temporary. 212 NLRB at 220.

permanent employment through advertisements, documents (as a whole) and consistent verbal reassurances.

Just as *Target Rock* did not mandate a finding that the replacement workers were temporary solely because the employment application included an "at will" statement, neither does *Belknap*, supra. The Court, in *Belknap*, ruled that employers could make an offer of permanent employment conditioned on, 1) a settlement with the striking employees; and 2) a Board unfair labor practice order directing reinstatement of the strikers. Id at 503. The Court went on to state, "If these implied conditions, including those dependent on the volitional act of settlement, do not prevent the replacements from being permanent, neither should express conditions which do no more than inform replacements what their legal status is." Id at fn. 8. Tyson included those conditional requirements in its PR form and independently assured replacement workers they were permanent replacements. While the Court did not specifically so state, it logically follows that an employer should be able to communicate a replacement worker's legal status (at-will) as long it makes clear to the worker that he or she is a permanent employee as it relates to the strike. The totality of Tyson's actions demonstrate it had a mutual understanding with replacement workers that they were permanent. Tyson sent that message from the time it advertised for positions through the conclusion of the strike. The replacement workers' testimony supports my finding that the overall message sent to them was that they were permanent and they would not be terminated at the conclusion of the strike. I therefore find that the replacement workers who are employed as of the voter eligibility cutoff date will be eligible to vote.

B. Voter Eligibility of Former Strikers Based on the SSA

I need not consider this particular issue, given my finding that the replacement workers are permanent replacements. However, I nonetheless am making findings solely in the event that the Board reverses my primary finding and instead concludes the replacement employees are temporary replacements.

The Employer and the Petitioner assert that, if the Board determines the replacement workers are temporary replacements, it is their common position that the Union waived the immediate reinstatement of the former strikers pursuant to the SSA, hence the former strikers are ineligible to vote.

Conversely, the Union contends it did not waive the former strikers' right to immediate reinstatement by signing the SSA, hence they remain eligible to vote.

1. Legal Standard

It is well established that a waiver of statutory rights must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Court "will not infer from a general contractual provision the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" Ibid.

The "clear and unmistakable" intent must be expressed in either the language of the collective-bargaining agreement or during bargaining before the contract is consummated. *Aqua-Chem, Inc.*, 288 NLRB 1108, 1119 (1988), enf'd. 910 F.2d 1487 (7th Cir. 1990), cert. denied, 501 U.S. 1238 (1991), (citations omitted). This test also applies to employer claims that a union waived former strikers' statutory reinstatement rights.[16] Ibid, citing *George Banta Co.*, 256 NLRB 1197 (1981), enf'd. 686 F.2d 10 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983).

[16] I would note that the strike settlement agreement in this case includes language stating, "The parties recognize that the Company has hired permanent replacements." While the union did not challenge the status of replacement

2. Factual Findings and Recommendations

On January 29, 2004, Union members ended the strike when they ratified the successor CBA and the SSA went into effect. Paragraph two (2) of the SSA sets forth the method to be used when recalling former strikers. Sub-paragraph J states:

> 2. Tyson agrees that all striking bargaining unit employees shall upon ratification of the CBA be returned to work subject to the conditions herein as follow:
>
> J. The Union agrees that all permanent replacements hired after the commencement of the strike and employees who returned to work prior to the end of the strike will be permitted to remain at their current job.[17]

The ambiguous language of this provision and the Union's actions during and after negotiations of the SSA demonstrate that the Union did not waive the former strikers' right to immediate reinstatement.

The Employer and the Union met to negotiate a successor CBA on December 18 and 19, 2003 and January 9 and 10, 2004. At those meetings the Employer was represented by McCoy, Dan Serrano, Traver and Ken Kimbro. The Union was represented by Rice, Regional Director for Region Six of the Union Kevin Williamson and six to eight of the committee members.

During the meetings the Employer consistently took the position that the replacements were permanent and it was not going to terminate them. Conversely, the Union took the position that the replacements were temporary and should be discharged. In the December 18 meeting, Rice testified that the Union took the position that the

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workers in *Aqua-Chem*, I find that the language, in *Aqua Chem*, is less ambiguous on its face than the language in the SSA at issue in the present case. Id at 1115.

[17] Paragraph 5 of the SSA states that the parties mutually agree "…to refrain from initiating any new legal proceeding against the other party for conduct related to the strike occurring prior to the date of the CBA."

replacements were "at-will" employees because of their employment applications. In response Traver stated that he did not care, that he had made a commitment to the replacement workers because they had been committed to the corporation.

At the meetings on January 9 and 10, the Employer and the Union maintained their positions regarding the status of the replacements. [18] However, Traver testified that he believed the Union changed its position because it signed the SSA.[19] McCoy testified that he believed the Union changed its mind about its desire to terminate permanent replacements because Williamson said, "Can we look at this by seniority. Can we do this some way. Can we get -- can we have something to take back to our membership as we take back the agreement of how they would get back to work, if they would be recalled." Rice's testimony suggests that the Union maintained its position regarding the temporary status of replacements during these sessions. Rice testified the Union agreed to the SSA and stated, "that, if it was in terms of the position we had taken all along based on legal counsel if they truly were permanent replacements, yes, this would be the recall order."

The membership ultimately ratified the collective-bargaining agreement and the SSA went into effect.[20] Upon ratification, on January 30 Rice sent McCoy a letter stating the members ratified the most recent proposal and,

> On behalf of these striking employees, Local 538 hereby unconditionally offers to return to work effective on February 2, 2004.
>
> We maintain that the replacement workers you hired are not permanent replacements within the meaning of Federal labor law. Accordingly, we request that they be terminated immediately.

[18] Rice testified that there were side-bar meetings between Williamson and Kimbro during the negotiations. However, neither Williamson nor Kimbro testified at the hearing.
[19] The SSA was drafted by the Employer.
[20] There was no testimony about what the membership was told about the status of the replacement workers or paragraph 2(J) of the SSA.

The letter further requests that replacement workers be assessed initiation fees and dues.

Upon its receipt of the letter, the Employer asked to meet with the Union and did so on February 4, 2004. At that meeting, McCoy testified the Employer told the Union that it felt the Union was in breach of the SSA because the workers were returning conditionally and the permanent replacements were not to be displaced. The Employer demanded that the letter be re-written. Rice agreed that the Employer told the Union it ratified and signed a conditional contract and that, if the letter was not modified, there was no deal. However, he testified that the Employer also stated, "we know you have a right to always challenge replacement workers."[21]

As a result of the February 4, 2004 meeting, Rice sent a modified letter to McCoy that stated the members ratified the most recent proposal and:

> On behalf of the striking employees, Local 538 hereby offers to return to work effective on February 2, 2004, under the terms of the ratified contract agreement.

The letter further requests that replacement workers be assessed initiation fees and dues.

Since February 4, 2004, representatives of the Employer and the Union have been meeting to oversee the return of the striking workers back into the workplace.

3. Legal Conclusions

I find that the evidence fails to demonstrate that the Union clearly and unmistakably waived the former strikers' right to immediate reinstatement. *Metropolitan Edison Co. v. NLRB*, supra at 708. Neither the contract language alone, nor the Union's actions during and after negotiations, demonstrated that the Union waived its right to assert the above position.

[21] During this meeting the parties agreed to develop a joint committee to oversee the return of the striking workers back into the workplace.

In *Aqua-Chem, Inc.*, the Board affirmed the Judge's determination that the Union did not waive the reinstatement rights of former strikers when it agreed to language in the strike settlement agreement stating strikers would be recalled when "vacancies" occur. *Aqua-Chem, Inc.*, 288 NLRB 1108, fn. 4 (1988). The employer in that case laid off employees, including strike replacements, during an economic downturn after the conclusion of the strike. Thereafter, the employer reinstated the laid off strike replacements before recalling former strikers from the preferential hiring list. Id at 1114. The employer asserted that it was not required to recall the former strikers because laying employees off did not create a "vacancy," as contemplated by the strike settlement agreement. Id at 1118. The Judge found that use of the term "vacancy" was ambiguous and there was "no discussion concerning the recall rights of reinstated strikers in the event of a layoff of replacements." Id at 1119. He determined that statutory rights take precedence over contractual ambiguity. Ibid.

In the present case, as in *Aqua-Chem*, the language in the SSA is ambiguous. The SSA states that "The Union agrees that all permanent replacements hired after the commencement of the strike…" The SSA fails to define "permanent replacement." Moreover, there is no provision stating that the Union agreed that the replacements were permanent. When it drafted the SSA, the Employer could have included language defining the status of the replacement workers, making the waiver clear. It did not.

In addition to the ambiguous language, the Union's actions, during and subsequent to negotiation, reinforce its position that it did not waive the former strikers' immediate reinstatement rights. The Union stated in the December 18, 2003, negotiation session that it considered the replacements to be "at-will" employees based on the employment application and sought their discharge (upon the strike's end). Throughout

negotiations the Union maintained the position that the replacements were temporary and should be discharged. McCoy's vague testimony about Williamson's statement, discussing seniority for recalled workers, does not negate the Union's position.

After the proposal was ratified, the Union, in accord with the position it maintained throughout negotiations, made an unconditional offer for strikers to return to work and sought the immediate discharge of the replacement workers. While the Union modified this letter, nothing in the modified letter undermines its position that the replacements were temporary.[22] Unlike the parties in *Aqua-Chem*, supra, the Union and the Employer here did discuss the status of the replacement workers. However, their consistently opposing positions only serve to strengthen the determination that the Union did not waive the strikers' reinstatement rights. I therefore find that if the Board determines that the replacement workers are temporary, the former strikers may be eligible to vote.

2. Voter Eligibility of Former Strikers Who Are Not Reinstated as of the Voter Eligibility Date

The Petitioner asserts that strikers who are not recalled as of the voter eligibility cutoff date are not eligible to vote because the strike began over 12 months ago. Conversely, the Union asserts that those employees should be eligible to vote because the

[22] The Employer relies on *Gem City Ready Mix Co.*, 270 NLRB 1260 (1984), stating that in the SSA, "there is no express statement, in so many words, that the union waives the right to claim the replacements are not permanent, but a waiver need not be spelled out explicitly where, as here, the union's conduct during and after negotiations displayed an intent to waive the issue." However, unlike the present case, the union, not the employer, in *Gem City*, drafted the language of the SSA. Further, the Board found in relaying the proposal to the striking employees, the steward recommended that it was "better to be number 4 or 5 on the [seniority] list [that is, behind the three strike replacements who would receive top seniority under the Respondent's strike settlement proposal] than to be number 10 or 11." Ibid. The Board further found that, prior to ratification, there was a thorough discussion with the union members with an obvious understanding of the ramifications. Ibid. Conversely, in the present case it was the Employer who drafted the language and there was no evidence establishing that the union membership understood that the SSA would waive their rights to immediate reinstatement.

duration of the strike was less than one year. The Employer takes no position on this issue.

A. The Legal Standard

The Board has consistently held that when an election occurs more than 12 months after the inception of a strike, economic strikers who have not been recalled as of the voter eligibility date are ineligible to vote. *See Thoreson-McCosh, Inc.*, 329 NLRB 630 (1999); *Carole Cable Co. West*, 309 NLRB 326 (1992); *Wahl Clipper Corp.*, 195 NLRB 634 (1972).

B. Factual Findings and Recommendations

As stated earlier, the strike at issue here is an economic strike. The employees went on strike on February 28, 2003, and ended the strike on January 30, 2004. The election that will be held pursuant to this Decision and Direction of Election will take place at some future date. There is no question that well over a year will have elapsed between the beginning of the strike and the future election.

The Board in *Carole Cable*, held that former economic strikers were not eligible to vote in a deauthorization election when that election was held more than 12 months after the commencement of an economic strike. 309 NLRB at 326. The employees in that case went on strike in mid-June 1991. The strike was settled in March of 1992 pursuant to a new collective-bargaining agreement and an agreement to retain the replacement workers. Ibid. A preferential recall list was established for the former economic strikers who made offers to return to work. Those former strikers, who voted but had not been reinstated as of the date of the election, were challenged. Ibid. The Board held that since

none of those strikers had been reinstated by the voter eligibility date, they would not be eligible to vote. Ibid.

Similarly, in the present case the former economic strikers commenced their strike over a year ago. I therefore find that those former strikers who have not been reinstated as of the voter eligibility cutoff date of the election will not be eligible to vote.[23]

3. Voter Eligibility of Former Economic Strikers Who Have Not Submitted a Job Preference Recall Form

The Employer and the Petition assert that those former strikers who have not submitted a Job Preference Recall Form under the terms of the SSA are not eligible to vote in the requested deauthorization election because they have abandoned their jobs.[24] The Petitioner additionally argues that the former strikers who are not reinstated as of the voter eligibility cutoff date are ineligible to vote because those strikers engaged in an economic strike that began more than 12 months ago in accordance with *Carole Cable*,

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[23] The Union asserts that former economic strikers who have not been recalled are analogous to laid off employees who have a reasonable expectation of recall. While the Union does not present any case law in support of this position, the Board considered and rejected that argument in *Wahl Clipper Corp.*, 195 NLRB 634 at 636.

The Union further argues that the economic strikers should be eligible to vote because the strike itself was not longer than one year. However, as stated above, the Board has repeatedly held that standard is the time elapsed between the beginning of the economic strike and the date of the election. *See Thoreson-McCosh, Inc.*, 329 NLRB 630 (1999); *Carole Cable Co. West*, 309 NLRB 326 (1992); *Wahl Clipper Corp.*, 195 NLRB 634 (1972).

[24] Paragraph 2(A) of the SSA states:

> 2. Tyson agrees that all striking bargaining unit employee shall upon ratification of the CBA be returned to work subject to the conditions herein as follow:
>
> A. Striking employees shall notify Tyson HR Department in writing at the following address; Tyson Prepared Foods, 1 Rock River Road, Jefferson, WI 53549 of their intent to [return to] work no later than five (5) calendar days after ratification of the CBA. In the event of extenuating circumstances team members[s] may have up to fifteen (15) days to notify the company and at which time they will be slotted base[d] on their seniority at that time.

supra. Conversely, the Union argues that those former strikers should be eligible to vote because they have not abandoned their jobs.

I need not decide whether strikers who have not submitted a Job Preference Recall Form have abandoned their jobs in order to determine whether such strikers are eligible to vote. To the extent there are questions regarding the job abandonment issue, this is not the proper proceeding in which to make those determinations.

However, in accordance with my above finding in Section 2, all former strikers, including those who did not submit Recall Forms, who have not been reinstated by the voter eligibility cutoff date are ineligible to vote.

Conclusion

For the foregoing reasons, I find the replacement workers, being permanent replacements, are eligible to vote in the election. Any former strikers who have been reinstated by the voter eligibility date are also eligible to vote.

The exact number of employees eligible to vote will be determined as of the eligibility date of the election. I find the most recent information, the team member list as of April 1, 2004, reflects there are approximately 384 eligible employees.

Direction of Election

In accordance with my findings herein, an election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been

permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

A. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the ***full*** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 310 West Wisconsin Avenue, Suite 700, Milwaukee, WI 53203, on or before **May 14, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (414) 297-3880, or by E-mail to Region30@NLRB.gov. Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

B. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570–0001. A request for review may also be filed electronically. For details on how to file a request for review electronically, see http://gpea.NLRB.gov/. This request must be received by the Board in

Washington by 5:00 p.m., EST on **May 21, 2004**.

Signed at Milwaukee, Wisconsin on May 7, 2004.

/s/Irving E. Gottschalk
Irving E. Gottschalk, Acting Regional Director
National Labor Relations Board
Thirtieth Region
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